In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1067

AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, ET AL., PETITIONERS

v.

LOCAL 1441, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, AND RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, and NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

Petitioners, who were respondents in the Board proceeding, were permitted to intervene in the court of appeals (Pet. 2), and thus have standing to file the instant petition. *International Union of Mine, Mill and Smelter Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 338. The petition was

timely filed,[1] and the jurisdiction of this Court is properly invoked under 28 U.S.C. 1254(1).

STATEMENT

The Board dismissed, as unsupported by the evidence, a complaint alleging that Miracle Mart Corporation, which owned a chain of retail discount stores, illegally assisted petitioners, the Amalgamated Clothing Workers of America, AFL-CIO and certain of its joint boards, in organizing a new store in Muncie, Indiana (J.A. 190-195).[2] A key question in the case was whether three Amalgamated organizers (Norma Howard, Anna Fee and Mildred Denham), who were hired by Lester La Victor, the manager of the Muncie store, were placed in the store pursuant to a "conspiracy" between the Company and the Amalgamated to help the latter organize the employees in the store. The Trial Examiner found that the three employees had been hired pursuant to

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[1] The judgment of the court of appeals was entered on December 12, 1963, and a Petition for Rehearing and Rehearing *en banc* was denied on February 12, 1964 (Pet. 21, 25). The petition for certiorari was filed on May 4, 1964.

[2] "J.A." references are to the Joint Appendix printed for the use of the court below and filed with the petition.

The complaint, which was based on charges filed by Local 1441, Retail Clerks Association, AFL-CIO and its parent International, alleged that the Company violated Sections 8(a)(1), (2) and (3), and the Amalgamated, Sections 8(b)(1)(A) and (b)(2), of the Act. The illegal assistance allegedly culminated in the execution of a contract with a union security provision, which was also allegedly unlawful. The relevant statutory provisions are set forth in the opinion of the court below (Pet. 22, notes 1 and 2).

such a conspiracy, basing his finding on the testimony of Charles Breihof, General Manager and Labor Relations Director of the Company. Breihof testified that, shortly before the new store was opened, Max Ungar, a representative of the Amalgamated, asked him to hire three women, who were strong Amalgamated supporters, and Breihof agreed (J.A. 175-176; 30-31). The Board set aside the Trial Examiner's finding. The Board held that, even assuming that Breihof had arranged with Ungar to hire three Amalgamated organizers, the record did not establish that the three employees in question were hired pursuant to that arrangement. The Board found, rather, that these employees were hired by Store Manager La Victor in the normal course of the Company's business. (J.A. 204-205.) The Board added that the arrangement between Breihof and Ungar standing alone was not unlawful, because at most it would indicate an intent to violate the Act which was not sufficient to establish the unfair labor practices charged (J.A. 205-206).

The court of appeals reversed. It held that, if there was a conspiracy between the Company and the Amalgamated to organize the Muncie store, further proof of its effectiveness was not required to establish a violation of the Act (Pet. 23). Accordingly, it remanded the case to the Board "for the taking of the testimony of Ungar and La Victor, together with any

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The Board noted that La Victor, and not Breihof, did all the hiring at the Muncie store, and that there was no showing that La Victor knew about the alleged agreement between Breihof and Ungar (J.A. 205).

other testimony which may assist the Board in determining whether or not a conspiracy to violate the sections of the Act in suit did in fact exist" (Pet. 24).[4]

DISCUSSION

The basic question presented by the petition is whether an agreement between a union agent and an employer to hire union organizers violates the National Labor Relations Act, where there is no showing that the agreement was in fact carried out (Pet. 2). That question is not ripe for review and, in any event, is not of sufficient importance to warrant review by this Court.

Thus, on the remand ordered by the court below (which the Board has decided to accept), the Board may find that no conspiracy in fact existed with respect to the hiring of the three Amalgamated supporters,[5] or that the conspiracy not only existed but was indeed carried out. In either event, the question presented would be rendered academic. That question would be reached only if the Board were to find, on the remand, both that the conspiracy existed and it was never carried out; and, should the Board so find, petitioners would then be free, if the Board's findings were sustained by the court of appeals, to seek review by this Court.

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[4] Neither Ungar nor La Victor testified at the prior Board hearing.

[5] In its prior decision, the Board merely assumed *arguendo* that such a conspiracy existed. The Board, however, did not have the benefit of the testimony of Ungar and La Victor, which the court below has directed it to take.

For these reasons, and because such an arrangement between an employer and a union is rarely not carried out,[6] the Board decided not to seek certiorari.[7] However, should the Court grant this petition, the Board would defend its decision.

Respectfully submitted,

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MAY 1964.

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[6] The cases cited by petitioners (Pet. 12-14) involve different facts.

[7] There is no substance to petitioners' contention (Pet. 16-19) that the court of appeals exceeded its authority in remanding the case to the Board for the taking of additional testimony. See *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. 364, 373. In view of the fact that the Trial Examiner found that a conspiracy existed, and the Board, in reversing the Examiner, addressed itself to that issue at least *arguendo*, a remand on that issue was obviously not contrary to Section 10(e) of the Act, which precludes the reviewing court from considering an "objection that has not been urged before the Board, its member, agent, or agency" (Pet. 16).

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